IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1261

NORMAN A. CARLSON, Director,
Federal Bureau of Prisons, *et al.*,

Petitioners,

v.

MARIE GREEN, Administratrix of
the Estate of JOSEPH JONES, JR.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is reported at 581 F.2d 669 (7th Cir. 1978) (Pet. App. 1a-17a). The decision of the District Court is not reported (Pet. App. 22a-27a).

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 18a–19a) was entered on August 3, 1978. A petition for rehearing was denied on November 24, 1978 (Pet. App. 20a–21a). A petition for writ of certiorari was filed on February 13, 1979, and was granted on June 28, 1979, along with the motion of Respondent for leave to proceed *in forma pauperis*. (A. 29). The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. §1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

The Plaintiff-Respondent (hereinafter Plaintiff), Mrs. Marie Green, is the next of kin and Administratrix of the Estate of Joseph Jones, Jr., her deceased son, who was a federal prisoner at Terre Haute Federal Correctional Center, and who, she alleges, died as a result of medical care so inappropriate as to evidence deliberate indifference to serious medical needs.[1]

Plaintiff alleges the following in her complaint: Joseph Jones had been diagnosed as a chronic asthmatic in 1972 when he entered the federal prison system. In July 1975, his asthmatic condition required hospitalization for eight days at St. Anthony's Hospital in Terre Haute. Despite the recommendation of the treating physician at St. Anthony's that he be transferred to a prison in a more favorable climate, Jones was returned to the Terre Haute prison.[2] Upon his return he was not given proper medication and was not given the steriod treatments ordered by the physician at St. Anthony's.

On August 15, Jones was admitted to the prison hospital with an asthmatic attack. Although he was in serious condition for some eight hours, no doctor saw him because none was on duty and none was called in. Defendant Dr. Benjamin DeGarcia, the chief medical

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[1] Plaintiff's complaint contains a claim under the Fifth and Eighth Amendments for the "deliberate indifference to serious medical needs" as well as a claim under the equal protection component of the Fifth Amendment, alleging that this deliberate indifference was caused in part by racial discrimination (Count III, Plaintiff's Complaint).

[2] The treating physician made two specific recommendations: Lexington, which has a good management program for chronic diseases, and Sandstone, which has a drier climate. The recommendations were ignored.

officer directly responsible for the prison medical services, did not provide any emergency procedure for those times when a physician was not present, and allowed a prison hospital to function with totally inadequate staff, improperly trained, and without proper equipment and procedures.

As time went on, Jones became more agitated and his breathing became more difficult. Although Jones' condition was serious, defendant Medical Training Assistant William Walters, a non-licensed nurse then in charge of the hospital, deserted Jones for a time to dispense medication elsewhere in the hospital. When he returned, Walters brought a respirator and attempted to use it, despite the fact that Walters had been notified two weeks earlier that the respirator was broken. After Jones pulled away from the respirator and told Walters that the machine was making his breathing worse, Walters administered two injections of Thorazine, a drug contraindicated for one suffering an asthmatic attack. A half-hour after the second injection, Jones suffered a respiratory arrest. Walters and Staff Officer Emmett Barry brought emergency equipment to administer an electric jolt to Jones, but neither man knew how to operate the machine. Jones was then removed to St. Francis Hospital in Terre Haute; upon arrival he was pronounced dead.

The death of Jones was the fourth inmate death from medical care inadequacies in a seven-month period. Despite letters of protest to prison officials (specifically placing Defendants Carlson, Benson and Brutsche on notice), as well as a peaceful work stoppage joined in by 900 prisoners after the third prisoner death, the Defendants did nothing to change the blatantly inadequate medical conditions. Thus this case presents a classic

example of deliberate indifference to serious medical needs resulting in the denial to the decedent prisoner of basic human and constitutional rights.

On June 18, 1976, Plaintiff Marie Green filed a complaint on behalf of her deceased son's estate. Named as Defendants were five officials, officers and employees of the Federal Bureau of Prisons, sued in their official and individual capacity, and the Assistant Surgeon General of the United States, also in his official and individual capacity.[3] Also named as a Defendant was the Joint Commission on Accreditation of Hospitals, which was responsible for accrediting and inspecting the prison hospital at Terre Haute.

The complaint, invoking 28 U.S.C. 1331(a) jurisdiction, alleged that Joseph Jones, Jr. died as a result of medical care so inappropriate as to evidence intentional maltreatment, and that the Defendants' acts violated the due process clause and the equal protection component of the Fifth Amendment in addition to the Eighth Amendment's prohibition against cruel and unusual punishment. Plaintiff prayed for a total of $1,500,000 in actual damages, and $500,000 in punitive damages.

On January 10, 1977, the District Court, pursuant to motions filed by the Defendants, dismissed the complaint for lack of subject matter jurisdiction. The Court held that the Plaintiff could not satisfy the $10,000 jursidictional amount requiremnt of 28 U.S.C. §1331(a) because of the limitations on recoverable damages under the

[3] Defendant Brutshe visited Terre Haute twice in 1975 to review specific cases, as well as to inspect the total medical program at Terre Haute. He gave the medical facilities his approval and failed to recommend needed changes in equipment, procedures and availability of trained medical staff.

Indiana wrongful death and survival statutes. In dismissing the complaint, the District Court noted that these Indiana State statutes were the "sole mechanisms" (Pet. App. 26a) by which Mrs. Green, as the sole representative of her son's estate, could maintain an action for damages.

The Trial Court recognized that an action for damages may be brought for a violation of a right guaranteed by the Constitution, *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971), and further that Joseph Jones, Jr., could have maintained this *Bivens*-type action under *Estelle v. Gamble,* 429 U.S. 97 (1976), had he survived the alleged wrongs. However, the District Court determined erroneously that survival of Jones' federal claim was governed by state law.

The Seventh Circuit Court of Appeals reversed the decision of the District Court in all relevant parts. The panel agreed with the District Court that the Plaintiff had sufficiently alleged a *Bivens*-type right of action arising directly under the Eighth Amendment. Further, the Court, refusing to apply the Indiana survival statute, found the jurisdictional amount requirement of 28 U.S.C. §1331(a) to be satisfied. The Court concluded that "whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants *whose conduct results in death,* the federal common law allows survival of the action." *Green v. Carlson,* 581 F.2d 669, 675 (7th Cir. 1978) (emphasis added).

On November 24, 1978, the Seventh Circuit Court of Appeals, on consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by the Defendant-Petitioners (hereinafter Defendants), and after ordering the Plaintiff to file an answer to said Petition, denied the Petition for rehearing in all respects. (Pet.

App. 20a–21a). The Defendants, on February 13, 1979, filed their petition for a writ of certiorari, raising for the first time the issue of the Federal Tort Claims Act as an exclusive, adequate, alternative remedy. This Court granted certiorari on June 18, 1979.

SUMMARY OF ARGUMENT

I.

The Plaintiff has alleged serious violations of the Fifth and Eighth Amendments to the United States Constitution which resulted in the death of Joseph Jones, Jr. Specifically, she alleges that these constitutional deprivations, motivated in part by racial animus, constituted deliberate indifference to serious medical needs. *Estelle v. Gamble,* 429 U.S. 97 (1976). Such claims are cognizable directly under the Constitution. *Bivens v. Six Named Unknown Agents,* 403 U.S. 388 (1971); *Davis v. Passman,* ___ U.S. ___, 99 S.Ct. 2264 (1979). The Defendants' characterization of Plaintiff's complaint as merely one of negligent medical malpractice (*see, e.g.,* Br. Pet. at 27, 33) misrepresents the facts pled and disregards the opinions of the two Courts below. This effort is designed to make colorable its groundless assertion that the Federal Tort Claims Act (FTCA) provides an exclusive and fully adequate remedy for the Plaintiff.

II.

As an examination of the FTCA demonstrates, it fails as a constitutionally adeqaute substitute for a *Bivens* remedy. No further proof need be sought than the fact that Plaintiff's claim, under the FTCA, would abate because the choice of law provision of the Act, 28 U.S.C.

§1346(b), would apply the Indiana survival statute. *Ind. Code Ann.* §34-1-1-1. The FTCA fails to fully effectuate the goals of compensation and deterrence which underlie a *Bivens*-type action, and undermines the important policy of uniform application of laws. The failure in deterrence flows from the Act's complete removal of the individual wrongdoer from personal liability and the failure to provide for punitive damages or a disciplinary mechanism. Deterrence of unconstitutional acts is an important cornerstone of *Bivens* claims, as well as its state action counterparts under 42 U.S.C. §1983. *Bivens; Butz v. Economou*, 438 U.S. 478 (1978). The Plaintiff's opportunity to seek full compensation is severely limited by the Act's eradication of the right to trial by jury; its requirement of administrative exhaustion; its extension to the government of additional defenses to, and immunities from, suit; and its bar to prejudgment interest. Further, it strips the Plaintiff of the power and strength of her constitutional claims, reducing them to a mere tort. The importance of this cannot be minimized, as a *Bivens* claim, like 42 U.S.C. §1983 claims, is support by a body of decisional law, grounded in the Constitution and the Bill of Rights. The decisional law, which repeatedly recognizes the importance of constitutional claims, would aid the Plaintiff both in pretrial discovery and at the trial itself. Further, the moral and legal power of a constitutional claim has an important influence on the trier of fact. The FTCA provides the Plaintiff here with *no remedy* and provides others who suffer Eighth Amendment claims under *Estelle* with a woefully inadequate remedy.

III.

Congress never intended the Act to apply to Plaintiff's claims, or for it to be her exclusive remedy. Prior to 1974, the FTCA never even applied to intentional harms, and, in the 1974 Amendments, Congress expressly made the FTCA remedy for certain intentional torts supplemental to a *Bivens* constitutional claim. Further, Congress has expressly rejected repeated attempts by the Department of Justice to amend the Act to include constitutional harms and to make that remedy exclusive.

IV.

The Court of Appeals correctly created a federal common law or survival where application of the Indiana survival statute would abate the Plaintiff's action against these Defendants, whose conduct resulted in the death of Joseph Jones. Application of the Indiana survival statute would frustrate the purpose of compensation and deterrence which underlie a constitutional damage action.

Where no state interest or policy is involved or effected, as is the case here, it is not necessary for the federal courts to look to state law. This conclusion is fully supported by *Bivens* where this Court rejected the assertion that remedies for violations of constitutional rights were to be tied to the vagaries of state tort law. *Cf. Monroe v. Pape*, 365 U.S. 167 (1961).

If resort is made to state law in fashioning a federal rule on survival, the result will be the same. Where the state survival statute is inconsistent and hostile to the policy underlying this *Bivens* claim, it must be rejected. Where a state survival statute does not provide for survival of a whole class of tort actions, and where death is caused by the unconstitutional conduct complained of, the state law must be rejected. This is the case here as

the Indiana survival statute, *Ind. Code Ann.* §34-1-1-1, totally abates not only this action but all actions where the conducts results in death. The Court of Appeals properly created a federal common law of survival in this case. Any other result would not merely be hostile to the policy which underlies constitutional damage actions, it would subvert that policy.

ARGUMENT

I.

THE PLAINTIFF HAS STATED CLAIMS ALLEGING VIOLATIONS OF FUNDAMENTAL CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND EIGHTH AMENDMENTS, AND THIS COURT MUST ENSURE FULL AND EFFECTIVE REMEDIES FOR SUCH DEPRIVATION.

The allegations against the defendants in this case involve the most egregious kind of behavior—deliberate indifferences to Joseph Jones' serious medical needs resulting in his death, motivated, in part, by racial discrimination.[4] As both courts recognized below, these allegations rise to the level of constitutional violations, and allow the plaintiff, as the administratrix of her son's estate, to sue directly under the Constitution. Yet the defendants argued, without precedent or reason, that

[4] Although totally ignored by the defendant's brief, Count III of plaintiff's claim alleges that:

> . . . the absolute failure to provide a positive course of essential medical treatment was caused in part by the fact that the deceased was black, and he was denied basic humane medical treatment, which resulted in his death, on the basis of race, in violation of the equal protection component of the Fifth Amendment to the United States Constitution.

Plaintiff's equal protection claim, under even the most tortured reasoning, is not in any way covered by the Federal Torts Claims Act.

plaintiff's relief should be limited to the remedy available under the Federal Tort Claims Act (hereinafter the FTCA), which does not contemplate the claims raised in this case.[5]

In *Bivens v. Six Names Unknown Agents,* 403 U.S. 388 (1971), the victims of an unlawful arrest, search and seizure, brought suit against federal law enforcement officers. In holding that the Court could create a judicial remedy for the violation of a right guaranteed by the Fourth Amendment, this Court clearly established "that a citizen suffering from a compensable injury to a constitutionally protected interest could invoke the general federal question jurisdiction to obtain an award of monetary damages against the responsible federal officials." *Butz v. Economou,* 438 U.S. 478, 504 (1978).

Last term this Court specifically reiterated its holding in *Bivens,* allowing a damage suit for a violation of the due process clause of the Fifth Amendment. *Davis v. Passman,* ___ U.S. ___, 99 S.Ct. 2264 (1979). There can be no question that this Court has recognized the judicial obligation to fashion a sufficient remedy to redress violations of constitutional rights.[6]

[5] Even the defendants did not consider that plaintiff's claims were covered by the FTCA, having not raised the issue of the Act's exclusivity before either of the Courts below.

This failure not only supports plaintiff's argument that her allegations are not fully redressable under the FTCA, but also that the writ of certiorari was improvidently granted. See Lawyers' Committee *amicus* brief at page 9. The plaintff does not raise this latter contention as she believes it is in her best interest, as well as the interest of future victims of unconstitutional harms that this Court rejects the defendant's belated and groundless position on the merits.

[6] Although this Court has not had many occasions to review the appropriateness of a damage remedy to vindicate violations of Constitutional rights, when it has been asked, it has unhesitatingly exercised its inherent power under Article III, §2 of the Consti-

[footnote continued]

Here, the Plaintiff's complaint alleges violations of fundamental constitutional protections contained in the Fifth and Eighth Amendments. Taking the allegations in Plaintiff's complaint as true, the District Court and the Court of Appeals found that Plaintiff's claim constituted a serious deprivation of constitutional rights.[7]

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tution to do so. *Wiley v. Finkler*, 179 U.S. 58 (1900); *Swafford v. Templeton*, 185 U.S. 487 (1902); *Jacobs v. United States*, 290 U.S. 13 (1939).

In *Bell v. Hood*, 327 U.S. 678 (1946), although reserving decision on the specific question decided later in *Bivens*, this Court noted that "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." 327 U.S. at 684.

[7]Judge Noland's "Order Granting Defendants' Motions to Dismiss and Entry of Judgment Thereon," dated January, 1977 (See Appendix D, Petition for Writ of Certiorari), stated, "The Court believes that given the serious allegations of the complaint herein if Jones were alive today he could properly maintain an action under §1331 alleging a denial of proper medical treatment. *Estelle v. Gamble, supra.*" (Pet. App. 26a)

Similarly, Judge Swygert, speaking for a unanimous panel of the Seventh Circuit Court of Appeals in reversing the district court on the question of survival stated:

> The federal defendants challenged the sufficiency of the complaint to state a claim for damages under the Constitution. They contend that plaintiff's allegations merely assert a medical malpractice claim against the individual defendants cognizable in the state courts. We note that state law would apply to a claim of medical malpractice by federal employees. However, if the suit were against the federal government, it would be filed in federal court pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 et seq., not in state court. *United State v. Muniz*, 374 U.S. 150, 162, 83 S.Ct. 1850, 10 L.Ed. 2d 805 (1963) . . . Plaintiff's claim here alleges serious deprivation of constitutional rights, not mere negligence.
>
> . . . . .
>
> Under the criteria delineated in *Estelle*, the alleged conduct of the federal defendants rises to the level of constitutional violations.

(Pet. App. 13a-15a)

The Plaintiff has stated a claim of deliberate indifference to serious medical needs resulting in the deprivation of Joseph Jones' life. This claim is encompassed by the prohibitions against cruel and unusual punishment and therefore involves constitutionally protected rights.

This Court specifically recognized in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) that "deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment."[8] In recognizing that such a claim rose to the level of cruel and unusual punishment,[9] this Court reasoned:

> An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases such a failure may actually produce physical "torture or a lingering death" . . . . The evils of most immediate concern to the drafters of the [Eighth] Amendment. 403 U.S. at 103.

Respondent's complaint states the strongest of *Estelle* claims. The deliberate refusal to transfer prisoner Jones to a prison in a more appropriate climate despite the specific medical recommendation; the failure to provide prisoner Jones with his prescribed medicine; the total

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[8]The Court in *Estelle* further stated that such a violation occurs "whether the indifference is manifested by prison doctors in their response to the prisoners' needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." 429 U.S. at 105. *See also, Lee v. Olmstead*, 582 F.2d 1291 (4th Cir. 1978), *cert pending sub nom, Moffitt v. Lee*, No. 78-1260.

[9]This Court has found that the protections of the Eighth Amendment are particularly applicable to convicted prisoners. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978); *Ingraham v. Wright*, 430 U.S. 651, 664-71 (1977).

absence of any physician, competent paramedic, or emergency procedures, during a period of extreme medical need for prisoner Jones; the attempted use of a respirator known to be malfunctioning; the injection of contraindicated drugs and the prison staff's inability to operate the "electric jolt" machine; and the defendant's prior notice of these serious medical care inadequacies[10] constitute a gross level of indifference and cruelty.[11]

Despite the overwhelming allegations of serious constitutional violations resulting in death, the Defendants characterize this case as merely one of negligent medical malpractice. (*See, e.g.*, Pet. Br. at 27, 33) The Defendants' posture, however, misrepresents the substantial constitutional claims involved here in an effort to make colorable its groundless contention that the FTCA provides an exclusive and fully adequate remedy for the Plaintiff. The Defendants must diminish the nature of Plaintiff's claim, from a constitutionally protected right to one of mere negligence, in an effort to circumvent the constitutional remedy dictated by *Bivens* and *Davis*. Injuries inflicted by federal officials acting under color of law which result from deliberate indifference to serious

[10]This notice included the death of three black prisoners within the prior seven months due to these medical inadequacies and a resultant series of prisoner protests and complaints.

[11]The facts of this case are more compelling than *Ricketts v. Ciccone*, 371 F.Supp. 1249 (W.D. Mo. 1974), where the district court, granting a writ of habeas corpus, held that transferring a federal prisoner, whose chronic rhinitis would be best treated in a climate of low humidity, such as at the Federal Correctional Institute at LaTuna, Texas, to the U.S.P., Terre Haute, Indiana, in a climate of high humidity, would be violative of the Eighth Amendment prohibition against cruel and unusual punishment.

medical needs of a prisoner "while no less compensable in damages than those inflicted by private parties and substantially different in kind" to medical malpractice. 403 U.S. at 409 (Harlan, J., conferring).

This Court's determination in *Bivens* that the Fourth Amendment constitutes an independent limitation on the exercise of federal power applies with equal force to the Fifth and Eighth Amendments. The rights protected under these Amendments are of equal importance and magnitude, as the right to be free from cruel and unusual punishment is certainly no less significant than to be free from unreasonable search and seizure. Moreover, most lower courts have recognized that *Bivens* mandates a judicial remedy for violations of all constitutionally protected rights.[12] So long as the aggrieved plaintiff can demonstrate that the interest is one protected by the Constitution, that monetary compensation would be appropriate, and that the conduct complained of is the sort of abuse and power necessary to raise an ordinary tort to the stature of a constitutional violation,[13] "the

[12]*See, e.g., Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977); *Jacobson v. Tahoe Regional Planning Agency*, 558 F.2d 928 (9th Cir. 1977); *cert granted sub nom, Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 436 U.S. 943 (1978).

For exhaustive annotations, see Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 Hastings Const. L.Q. 531, 567-68 (1977). *See also, Davis v. Passman*, 571 F.2d 793, 897 n. 6 (5th Cir. 1978) (*en banc*) (Goldberg, J. dissenting), *reversed*, ___U.S. ___, 99 S.Ct. 2264 (1979).

[13]*See Estelle v. Gamble*, 429 U.S. 97 (1976). As *Estelle* demonstrates, negligent medical malpractice does not rise to the level of a constitutional violation. It is necessary to establish that the official acted with a degree of intent or extreme culpable negligence in bringing about the events that caused the aggrieved individual injury, as Plaintiff here has sufficently alleged.

entire panoply of personal and property rights enumerated in the first eight amendments to the Constitution . . . would seem equally appropriate predicates for damage remedies."[14]

This Court is not being asked to *extend* its holding in *Bivens*, as argued by the Defendants, but merely to apply it to other fundamental constitutional rights of equal stature and significance so that an effective remedy can be obtained, as clearly contemplated by the reasoning of the decision. Unless Congress has created an exclusive and equally effective remedy (see discussion below), *Bivens* and *Davis* constitutionally mandate that a judicially created remedy be employed in this case.[15] For this Court to defer to a congressional remedy which is not "equally effective" would be an abdication of its responsibility to insure that the policy of deterrence and compensation inherent in the redress of constitutional violations is enforced. Such abdication would seriously diminish the importance of the Bill of Rights as a source of positive law and as an independent limitation on the exercise of federal power.[16]

[14]Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922, 934 (1976).

[15]This Court has twice previously rejected the Defendants' argument here that the result in *Bivens* is a matter of principled discretion rather than constitutional compulsion. (Br. Pet. p. 22):

> At least in the absence of a "textually demonstrable constitutional commitment of [an] issue to a coordinate political department," *Baker v. Carr, supra*, 369 U.S. at 217, 82 S.Ct. at 710, we presume that justiciable constitutional rights are to be enforced through the Courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

Davis, 99 S.Ct. at 2275. *See also, Bivens*, 403 U.S. at 401-04 (Harlan, J., concurring).

Given the fundamental rights involved here, this Court must demand an absolute showing, devoid of all conjecture and speculations, that the FTCA was intended by Congress to be exclusive and that such remedy is in fact equally effective to protect these particular rights.

II.

THE FEDERAL TORT CLAIMS ACT DOES NOT PROVIDE A CONSTITUTIONALLY ADEQUATE REMEDY FOR THE REDRESS OF PLAINTIFF'S CLAIMS.

The Defendants argue that the Federal Tort Claims Act (FTCA) provides a "comprehensive" remedy for the constitutional violations alleged in this case (Pet. Br. p. 16, 32, 40); that this remedy is "more effective" than that afforded under the Constitution; that it provides "full relief for victims of unlawful official conduct"; and that a *Bivens* remedy is therefore "redundant." (Pet. Br. 32, 37). They further claim that the FTCA affords a "careful and thorough remedial scheme," and that the "comprehensive administrative and judicial procedures provided by the FTCA constitute an adequate Federal remedy . . . . " (Pet. Br. 20). This argument is completely refuted by a careful examination of the FTCA, when applied to Plaintiff's claims under the Fifth and Eighth Amendments.

As argued above, Plaintiff has not pleaded a malpractice claim against Bureau of Prisons officials, but rather claims arising directly under the Constitution.

[16]*See Butz v. Economou*, 438 U.S. 478, 565 (1978). *Cf., Robertson v. Wegmann*, 436 U.S. 584, 592 (1978); *Carey v. Piphus*, 435 U.S. 247, 257 (1978).

Defendants, in attempting to make the FTCA applicable here, repeatedly misstate her claim, as they must; for it is obvious that the FTCA was neither intended by Congress to cover claims under the Fifth and Eighth Amendments, nor does it offer an adequate remedy to those who have such constitutional claims.

The most compelling evidence of the inadequacy of the FTCA is found when the Plaintiff's claim is examined under Indiana State law, the law of the local forum, as required under the Act, 28 U.S.C. 1236(B), for her claim would abate in its entirety. Ind. Code Ann. §34-1-1-1. This would be true for all persons who die as a direct result of unconstitutional acts by government officials in the State of Indiana. Defendants not only neglect to address this reality, but attempt to distort in in a footnote by erroneously claiming that the Plaintiff's claim under Indiana law would be limited to medical and burial expenses, rather than abating completely. (Pet. Br. p. 27)[17] It is therefore starkly evident that Plaintiff and others like her in Indiana would have either no remedy whatsoever or, even accepting the Defendants' unsupportable argument, at most a woefully inadequate remedy, under the FTCA.

Apart from this fatal inadequacy, the FTCA provides an insufficient remedy for all Eighth Amendment claims which arise from "deliberate indifference" to medical needs, as well as for constitutional claims in general. As this Court has stated, the purposes of a constitutional

[17]The Government reaches this conclusion by attempting to apply a combination of the Indiana Wrongful Death Statute and the Indiana Survival Statute, an attempt which is wholly unsupportable, as the Court of Appeals held below, and which is more fully demonstrated in Argument IV, *infra*.

action under *Bivens* are to fully compensate the victim, to deter like conduct in the future, and to provide uniform application of federal law. *Bivens; Davis; Robertson v. Wegman* at 590-591; *Carey v. Piphus; Monroe v. Pape*, 365 U.S. 167 (1961).

By barring the award of punitive damages and by removing the personal liability of the law enforcement wrongdoer, the FTCA severely undercuts the goal of deterrence embodied in *Bivens* actions. The Act also restricts the ability of the victim to obtain full compensation for his injury by removing his right to elect a jury trial; by affording the Government not only all the defenses available to the individual wrongdoers but also extending immunity to acts otherwise actionable under the Constitution; and by placing the requirement of useless exhaustion as a barrier to suit. Further, requiring that a plaintiff bring her constitutional claim under the FTCA removes the power and special considerations afforded to protections of constitutional rights. Public policy requires that a constitutional claim be given great deference, that a victim's claim under the Constitution be facilitated, and that her remedy be jealously guarded by the courts to insure its adequacy. Finally, the need for the policy of uniform application of federal law is underscored by the abatement of Plaintiff's claim under application of the FTCA here.

A. The FTCA fails to provide for meaningful deterrence of unconstitutional acts of federal officials.

The Defendants contend that suit under the FTCA would "lead to greater deterrence of constitutional violations." (Pet. Br. p. 40) In fact, the opposite is true. A basic cornerstone of deterrence is found in the concept of individual liability, especially where the wrongdoer has violated the Constitution. As Justice White has said:

"It should hardly need stating that ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct." *Imbler v. Pachtman,* 424 U.S. 409 (1976); *see also, Monroe v. Pape.* This principle has been applied equally by the Court to situations where the claim arises directly under the Constitution against federal officials, and those arising under 42 U.S.C. §1983 against state officials. *Butz v. Economou.* In *Butz,* this Court, rejecting the government's pleas for absolute immunity for federal officials who violate constitutional rights, strongly reaffirmed the importance of personal liability to punish unconstitutional wrongdoing. *Butz,* 438 U.S. at 495, 501.[18] As Chief Justice Story has written, personal accountability for misconduct is

> founded upon a very plain principle of common sense and common justice; and that is, that no person shall shelter himself from personal liability, who does a wrong, under color of but without any authority, or by an excess of his authority, or by a negligent use or abuse of his authority. Where a person is clothed with authority, as a public agent, it cannot be presumed that the government means to justify, or even to excuse, his violations of his own proper duty, under color of authority.

J. Story, *Commentaries on Agency,* §308 (5th ed. 1857).

Significantly, it is the government and its Bureau of Prisons officials who stand before this Court as defendants and brazenly state that deterrence would be better

[18] Additionally, in *Monell v. Department of Social Services,* 436 U.S. 658 (1978), this Court again recognized the importance of personal liability in constitutional claims, by refusing to permit the use of agency principles to hold a municipality liable under 42 U.S.C. §1983, absent a municipal policy which caused the deprivation.

served if the Plaintiff sued under FTCA. This is the same government who must now defend numerous suits where high government officials are charged with gross constitutional violations which have arisen out of Watergate, FBI and CIA abuses, abhorrent prison conditions, and massive attempts to "cover up" the violations themselves.[19] If these claims are relegated to suit under the FTCA, which has no disciplinary mechanism, there is little or no chance of deterrence of such acts. If these federal agents are placed in no danger of being personally sued, brought to trial, found liable for their acts, or made financially responsible for their victims, it is hard to imagine how deterrence will be accomplished. The government asks us to trust the head of the agency to properly discipline the wrongdoers and to adopt "corrective" policies. In many circumstances, however, the head of the agency, or his trusted aides, are implicated in the unconstitutional acts complained of; and in prison setting, moreover, there is a long history of the Bureau of Prisons' refusal to voluntarily correct unconstitutional practices or to admit to their existence.[20] One need go no further than this case, where one of the defendants sued–Norman Carlson– is the head of the Bureau of Prisons.

[19] *See, e.g., United States v. Nixon,* 418 U.S. 478 (1974); *Halperin v. Kissinger,* ___ F.2d ___ No. 77-2015 (D.C.Cir. July 16, 1979); *Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979); *Adams v. Carlson,* 488 F.2d 619 (7th Cir. 1973); Senate Select Committee on Government Operations With Respect of Intelligence Activities, U.S. Senate Final Reports, Books 1-6; Hearings Vo. 1-7.

[20] *See, e.g.,* the seven-year legal struggle concerning the Segregation/Control Unit at the Marion Federal Penitentiary which is still being litigated. *Adams v. Carlson,* 488 F.2d 619 (7th Cir. 1973); 375 F.Supp. 1228 (E.D.Ill. 1973); 368 F.Supp. 1050 (E.D.Ill. 1973); *Bono v. Saxbe,* 450 F.Supp. 934, 462 F.Supp. 146 (E.D.Ill. 1978); *see also* the history of a *Bivens* damage suit which arose from the same proceedings, *Chapman v. Kleindeinst,* 506 F.2d 1246 (7th Cir. 1974); *Chapman v. Pickett,* 586 F.2d 22 (7th Cir. 1978).

Contrary to its assertions in its brief, the government's real position on deterrence under the present FTCA is more truthfully set forth by former Attorney General Bell's own words:

> If civil liability of Federal employees is removed, however, I recognize that some sort of mechanism should be established to insure the fair and effective disciplining of a Government employee who has violated a citizen's constitutional rights. This bill would not affect such as employee's liability under the criminal law, but criminal liability alone is not a complete system of accountability.
>
> To this end, I am personally agreeable to provisions which would assure effective and fair procedures to discipline an employee who has violated another's constitutional rights, procedures in which the injured person can participate in a meaningful way. We understand, however, the administration is considering such new procedures.

Statement of Griffin B. Bell, on S. 2117, Jan. 26, 1978, pp. 4-5. While Plaintiff does not concede that such disciplinary procedures would in fact supply sufficient alternative deterrence to that guaranteed by personal liability under *Bivens*, the Act as it now stands contains no disciplinary procedures whatsoever, making the absence of meaningful deterrence even more apparent.[21]

The award of punitive damages for egregious constitutional harm in proper cases is another important

[21] The government also inconsistently argues that personal liability against federal agents dampens their "ardor" to perform their duties. The very real effect of personal liability is to dampen their ardor to perform unconstitutional acts while they perform their duties. To claim that it would have an adverse effect on the performance of lawful duties is, as Justice Brennan has written, "a gossamer web self spun without a scintilla of support to which one can point." *Barr v. Matteo*, 360 U.S. 564, 590 (1959) (Brennan, J., dissenting).

component of deterrence which is expressly unavailable under the FTCA's purported "comprehensive remedial scheme." 28 U.S.C. 2674. An award of punitive damages in a proper case[22] has an important deterrent effect not only in curbing future malicious conduct by the federal agent held responsible, but also stands as an example to other officials who may contemplate violating a citizen's constitutional rights.

In this case, the Plaintiff has sought punitive damages for the Defendants' alleged deprivation of her decedent's Fifth and Eighth Amendment rights. The nature of these claims, if proven, would strongly support an award of punitive damages,[23] yet under FTCA such an award is barred. Further, an award of punitive damages is especially important to deterrence in those cases where the victim may not have suffered significant compensable

[22] Awards of punitive damages are made as a matter of course in appropriate circumstances under 42 U.S.C. §1983 for deterrence, and this Court has affirmed such use of punitives. *Carey v. Phiphus*, 435 U.S. 247, at 257 n. 11 (1978); *Spence v. Staras*, 507 F.2d 554, 558 (7th Cir. 1974); *Basista v. Weir*, 340 F.2d at 87, 88 (3d Cir. 1965); *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979) ($200,000); *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978) ($61,000); *Fiedler v. Bosshard*, 590 F.2d 105 (5th Cir. 1979) ($29,000). *See also, Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979); *Morrow v. Ingleburger*, 584 F.2d 767 (6th Cir. 1978); *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976); *Mansell v. Saunders*, 372 F.2d 573 (5th Cir. 1967). *See also, Adickes v. S.H. Kress Co.*, 398 U.S. 144, 233-34 (Brennan, J., concurring in part and dissenting in part). Under the rule of *Butz*, punitives should be equally employed in *Bivens* actions, as they are in §1983 claims.

[23] Compare the "deliberate indifference" standard in *Estelle* with Prosser's "deliberate disregard of the interest of others," standard for punitive damages, in *Prosser Law of Torts* §2 at p. 10 (4th Ed. 1971). *See also, Devitt and Blackmar*, Civil Jury Instructions.

damages, but the constitutional violation was nonetheless extreme in nature. *Basista v. Weir, Zarcone v. Perry, Spence v. Staras.* In such a circumstance, the importance of deterring the violation in the future is almost entirely dependent on the *personal* liability of the individual agent for punitive damages. So again the FTCA remedy so patronizingly offered by the government is adequate neither in redressing Plaintiff's claims, nor in redressing constitutional claims in general.

The remedy provided by the FTCA, therefore, completely fails to satisfy an important underlying purpose of constitutional actions, that of deterrence. To entrust this critical component of *Bivens* actions to the FTCA would, in effect, place federal agents above the law, a concept entirely alien to the principles of the Constitution. As this Court stated long ago:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

United States v. Lee, 106 U.S. 196, 220 (1882).

B. The FTCA fails to provide Plaintiff a meaningful opportunity for the full compensation of her constitutional claims.

The Defendants, in arguing that the Plaintiff has an "adequate alternative remedy," must also necessarily establish that she and others like her are afforded at least an equally complete, effective and comprehensive opportunity for full compensation, as she would be afforded under a *Bivens* claim. *Robertson v. Wegmann.* This, of course, cannot be sustained in Plaintiff's case, as her claim would completely abate if brought under the

FTCA. As a matter of general rule, however, Eighth Amendment and other constitutional claims are afforded a markedly less complete and adequate opportunity to obtain proper compensation under the FTCA than they would be under *Bivens.*

First, under the FTCA the victim is not permitted to elect trial by jury. This right, guaranteed by the Seventh Amendment, is extremely significant where the claim is constitutional in scope and the defendants are government officials. This right has been guaranteed in civil rights actions and, without doubt, is likewise guaranteed in *Bivens* claims. See *Curtis v. Loether*, 415 U.S. 189 (1974); *Richard v. Smoltich*, 359 F. Supp. 9 (N.D. Ill. 1963); *see also, Butz v. Economou.*[24] The jury's function is to act as the ultimate sovereign, and as a buffer between the government and the victim. The Defendants conjecture (Pet. Br. at 38) that juries have been reluctant to find for plaintiffs under *Bivens*. If true, this alleged bias applies equally where a judge sits as the trier of fact. The result in either case reflects the inherent bias of the legal and political system in favor of government officials and against the poor and dispossessed. Moreover, a victim may perceive a judge as more hostile to her claim because of his shared governmental employment with the defendants. In any event, the victim has the right to make a

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[24] *See also, Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959) (right to jury trial under §4 of the Clayton Act); *Dairy Queen v. Wood,* 369 U.S. 469 (1962) (right to jury trial in damage action for trademark infringement).

reasoned choice whether to procede to trial with a jury or rest her fate with a judge. *Cf. Bell v. Hood*, 327 U.S. 678, 681 (1946).[25]

Another way that the Act inhibits full compensation is to afford the government additional defenses and greater immunity than those provided to a *Bivens* defendant. Under the Act, the Government is provided all of the defenses which would be afforded to the individual agent,[26] 28 U.S.C. 2674, and the government is given absolute immunity from suit if its agents performed a discretionary function, such as planning an unconstitutional act, 28 U.S.C. 2679(a), *Dalehite v. United States*, 346 U.S. 15, 42 (1953), or if the unconstitutional act was done pursuant to statute or regulation, 28 U.S.C. 2680(a). In these two circumstances, which are becoming all too frequent,[27] the government would completely escape liability, and their acts would go completely undeterred, even though this Court has already expressly refused to extend absolute immunity to unconstitutional acts by law enforcement officials. *Butz v. Economou.*

[25]There are many considerations in a plaintiff's determination of whether to proceed by bench or jury. The nature of the claim, the reputation of the judge, the geographic area from which the venue is selected, the nature of the damages, and the expectation that a jury will in most circumstances bring back a larger award, are some of the more obvious examples.

[26]The significance of this as a restriction on an FTCA litigant's ability to properly pursue a constitutional claim under the Act was recognized by Griffin Bell, who pointed out in his testimony before Congress that the new proposed amendments to the FTCA would not permit the raising of these defenses. Statement of Griffin Bell on S. 2117, January 26, 1978.

[27]For example, federal agents who knowingly participated in the planning of an unconstitutional act which was performed exclusively by state agents, would arguably be immune under FTCA. Additionally, many of the unconstitutional abuses under the FBI's Cointelpro program were done pursuant to express written instruction from high Bureau officials; these instructions, the government would no doubt argue, have the same effect as a regulation. The higher officials, according to this argument, would be immune as performing a discretionary, planning function, and the agents who performed the unconstitutional acts would likewise be immune as acting pursuant to regulation.

Another limitation on a plaintiff's ability under the Act to seek full compensation and which directly conflicts with the policy of facilitating redress for constitutional wrongs, is the Act's requirement that the plaintiff first exhaust her administrative remedies by filing a claim with the agency whose agents allegedly perpetrated the injury. 28 U.S.C. §2675. The Act neither sets standards nor establishes a mechanism by which the agency is to investigate, adjudicate or determine the monetary value of the claim. Further, administrative exhaustion within the Bureau of Prisons by a federal prisoner is all but a useless act, especially here, where one of the main defendants, Director Norman Carlson, would have to, in effect, concede his own culpability in order to settle the claim. More generally, the relative positions of a prisoner and his jailer, and the high level of mutual distrust and hostility between these two adversaries, makes meaningful administrative redress extremely unlikely, an unfortunate reality which is reflected in almost every prisoner case decided in the past fifteen years. In keeping with the policy of facilitating constitutional claims, and to avoid requiring such useless acts, this Court has held that exhaustion is not necessary under 42 U.S.C. §1983. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961); *McNeese v. Board of Education*, 373 U.S. 668, 672-6 (1963). No meaningful distinction can logically be drawn between a §1983 claim and one under *Bivens* which would support a different principle concerning exhaustion, so the same principles no doubt apply to *Bivens* claims, with equal force and affect. *Butz*, 438 U.S. at 500, 504.

In derogation of this constitutional principle, Defendants argue that a *Bivens* claim is "especially inappropriate in this case because it would allow litigants to . . . avoid administrative procedures," (Pet. Br. 29-30), and that these procedures would be beneficial by "keeping numerous ['frivolous'] cases out of the courts." (Pet. Br. 39, 40) It is pure speculation that such administrative procedures will weed out frivolous suits; in fact, it is more likely on balance that meritorious claims will be eliminated, especially in a prison setting where there is a real probability than an uneducated prisoner, unrepresented by counsel, will fail to meet the exhaustion requirements, despite having a meritorious claim.[28] As this Court recognized in *Butz*, the Federal Courts, by proper use of dismissal, summary judgment, and the "firm application of the Federal Rules of Civil Procedure, will ensure that federal officials are not harassed by frivolous law suits." *Butz v. Economou*, 438 U.S. at 507-8. And as Justice Harlan said in *Bivens:*

> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

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[28]As to "weeding out" meritorious claims by administrative settlement, the lack of administrative standards, prisoner/agency hostility, and the unwillingness of prison officials to admit wrongdoing, as discussed above, make the realities of this *de minimus.*

Bivens, 403 U.S. at 411 (Harlan, J., concurring). An administrative exhaustion requirement, therefore, obstructs a plaintiff's ability to obtain full compensation, and frustrates the policies which underly this Court's removal of exhaustion requirements for constitutional claims. Further, by requiring the Plaintiff to bring her fundamental constitutional claim under a statutory tort theory her claim is stripped of its legal and moral strength, which is supplied by the Constitution; for a plaintiff armed with a cause of action protected by the Bill of Rights presents a case with more force and substance and thus has a greater likelihood of recovery.[29]

The above arguments make it clear that the opportunity for full and effective compensation to redress Plaintiff's claims is severely limited under the Act, which therefore does not provide either this Plaintiff or others who seek to redress their Eighth Amendment claims with an equally effective remedy.[30]

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[29]The constitutional cloak cannot be minimized in the pretrial stages, either, as the issues raised in pretrial discovery, such as privilege, would in all likelihood be determined more favorably to the victim against the backdrop of the constitution. *See, e.g., Gill v. Manuel*, 488 F.2d 799 (9th Cir. 1973); *Wood v. Brier*, 54 FRD 7 (E.D. Wisc. 1972); *Rosee v. Board of Trade*, 36 FRD 684 (N.D. Ill. 1964).

[30]In addition to the reasons stated above, the Act also prohibits the recovery of pre-judgment interest which is recoverable under a constitutional *Bivens* action. *See, Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979). Also, the Act's failure to provide for punitive damages limits full compenstation for constitutional deprivations, since such harm does not always lend itself to strictly compensable money damages, and often punitive damages is a manner by which the trier of fact can fully redress a violation of a fundamental right.

C. Application of the FTCA to Plaintiff's claim frustrates the policy of uniform application of the federal laws to vindicate constitutional rights.

Plaintiff's claim presents a compelling example of the need for uniform application of the federal law of liability and remedies to the unconstitutional conduct of federal officials, and demonstrates how that goal would be defeated by resort to a "common law tort" action under the FTCA. This case involves no state interests such that application of uniform federal rules would offend any notions of federalism. At issue here is the liability of federal agents at a federal prison for the unconstitutional deprivation of the life of a federal prisoner. "Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the state where the injury occurs." *Bivens*, 403 U.S. at 409 (Harlan, Jr., concurring). Further, as this Court said in *Davis v. Passman* at 2277, fn. 23:

> Deference to state court adjudication in a case such as this would in any event not serve the purposes of federalism, since it involves the application of the Fifth Amendment to a federal officer in the course of his federal duties. It is therefore particularly appropriate that a federal court be the forum in which a damage remedy be awarded.

This strong presumption that the liability of federal officials should not be tied to the "vagaries of common-law actions" would be defeated by application of the FTCA to Plaintiff's constitutional claim. The Act treats the government as a private person and determines liability according to the place where the misconduct occurred.

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages . . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government . . . under circumstances *where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*

28 U.S.C. §1346(b) (emphasis supplied). *See also, Richards v. United States*, 369 U.S. 1 (1962).

This choice of law provision, repeated throughout the Act, *see* 28 U.S.C. §2672, would defeat the goal of uniformity of treatment of federal officials while gaining nothing in return.

> As this very case illustrates, uniformity cannot be achieved if courts are limited to applicable state law. Here the relevant Indiana statute would not permit survival of the claim, while in *Beard* the Illinois statute permitted survival of the *Bivens* action. The liability of federal agents should not depend upon where the violation occurred.

Green v. Carlson, 581 F.2d 669, 674-75 (7th Cir. 1978) (Pet. App. 13a) Compare, *Robertson v. Wegmann.*

The government again seeks a result which was firmly rejected by this Court in *Bivens*, "to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different fron the relationship between two private citizens." *Bivens*, 403 U.S. at 391-92. The rights guaranteed by the Fifth and Eighth

Amendments are independent limitations upon the exercise of federal power and are not, nor should they be, tied to the peculiarities of the local common law. *Bivens*, 403 U.S. at 393-94. *See also, Monroe v. Pape*, 365 U.S. 167, 183 (1961). As Justice Harlan has stated,

> . . . a deprivation of constitutional rights is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy, even though the same act may constitute both a state tort and the deprivation of a constitutional right.

Monroe, 365 U.S. at 196.

Here, the application of the FTCA would not only reduce the Plaintiff's claim to a state common law tort and promote inconsistent and hostile determinations among Indiana and the other states, but would also extinguish her claim completely. Such a result clearly demonstrates why uniformity must be promoted where constitutional claims are at stake and why the failure to do so would completely defeat an adequate remedy.

* * *

Plaintiff's remedy under the FTCA, even if it does not completely abate, is completely inadequate,[31] for it

[31]The Defendants, in arguing that the FTCA is adequate here, place much reliance on this Court's decision in *Brown v. G.S.A.*, 425 U.S. 820 (1976). *Brown* is not only inapposite to this case, but in fact supports the Plaintiff's position. In *Brown* the Court found that Congress intended §717 of Title VII of the Civil Rights Act of 1964 to be the exclusive preemptive remedy for government employees who allege employment discrimination. As this Court recognized in *Brown*, §717 provides a comprehensive administrative and judicial remedy. Unlike the FTCA, Title VII specifically guarantees redress of the unconstitutional wrong, rather than miscasting the claim as a tort. Further, it provides for comprehensive administrative procedures, including a hearing before the neutral

[footnote continued]

provides neither full opportunity for compensation nor proper deterrence for the unconstitutional wrong. Additionally, application of the FTCA defeats the policy of uniform application of the federal law, and robs her claim of its constitutional power and strength. The Defendants' arguments must therefore be rejected.

III.

CONGRESS DID NOT INTEND TO INCLUDE CONSTITUTIONAL CLAIMS SUCH AS THOSE BROUGHT BY THE PLAINTIFF WITHIN THE AMBIT OF THE FTCA, NOR DID IT INTEND TO MAKE THE FTCA THE EXCLUSIVE REMEDY FOR ANY CONSITUTIONAL CLAIM.

The Court in *Bivens* was careful to point out that the absence of affirmative expression by Congress of the creation of an exclusive and equally effective remedy for violation of constitutionally protected rights was a critical factor in its recognition of a damage remedy directly under the Constitution. As the Court said,

> the present case involves no special factors counselling hesitation in the absence of affirmative action by Congress . . . [W]e cannot accept respondents' formulation of the question as whether the avail-

Civil Service Commission. As importantly, it firmly established a cause of action against federal defendants, grounded in the Fifth Amendment, where no clear remedy previously existed, thereby encouraging redress of constitutional violations under a statute which had already been subject to much constitutional interpretation in suits against state and private defendants.

In contrast, the FTCA offers no real administrative remedy; its judicial remedy is completely inadequate; there is a preexisting adequate remedy under *Bivens;* and relegation to the Act completely strips Plaintiff's claim of its constitutional protections, thrust and integrity, as well as its constitutional precedent, which had been developed in *Bivens* and 42 U.S.C. 1983 claims since this Court's decision in *Monroe v. Pape.*

> ability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.

Bivens, 403 U.S. at 396-97.

The requirement that Congress must intend its remedy to be exclusive and equally effective was reiterated last term in *Davis v. Passman*, where the Court held that the failure of Congress to provide a remedy for "unconstitutional federal employment discrimination" did not constitute the "'*explicit* Congressional'" declaration referred to in *Bivens* and did not foreclose a judicially created remedy. *Id.*, ___ U.S. at ___, 99 S.Ct. at 2277-78, quoting *Bivens*, 403 U.S. at 397. (emphasis in original).

Thus, in this case, absent an explicit congressional declaration that the Plaintiff must be remitted to some other remedy, she may recover for the estate of Joseph Jones, as his administratrix, money damages for the unconstitutional federal deprivation of life.

The Federal Tort Claims Act was not intended by Congress to be an exclusive remedy for the kind of official lawlessness and serious constitutional deprivation alleged here. First, the statute itself reveals that "whenever Congress intended to make the FTCA remedy the exclusive remedy it has done so explicitly." *Hernandez v. Lattimore*, ___ F. 2d ___, No. 78-2098 (2d Cir., June 2, 1979) (slip op., p. 2898). Congress has declared the Act to be the exclusive remedy in cases arising from the negligent operation of motor vehicles by federal employees, 28 U.S.C. 2679; in cases involving the malpractice of certain government physicians, 38 U.S.C. 4116, 42 U.S.C. 233, 2458(a), 22 U.S.C. 817, U.S.C. 1089; and in cases involving the manufacturers of swine flu vaccine, 42 U.S.C. 247(b). The fact that Congress has specifically refused[32] to extend exclusivity to other kinds of cases is compelling evidence that the Congress did not intend the FTCA to be the exclusive remedy in all other cases, including ones involving deliberate indifference to serious medical needs, constituting cruel and unusual punishment.

In the 1974 amendments to the Act, Congress for the first time made the Act applicable to certain intentional torts of federal law enforcement officials. The amendment of §2680(h) of the Act provides that an aggrieved individual shall be able to maintain an action against the United States for "[a]ny claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" caused by the act or omissions of "investigative or law enforcement officers of the United States Government." On its face, the amendment does not apply to the type of claims Plaintiff has asserted here—death resulting from deliberate indifference to serious medical needs and racial discrimination by federal prison officials resulting in the denial of equal protection. Moreover, regardless of any specific applicability to the constitutional claims here, the 1974 amendments demonstrate the clear congressional intent to make the FTCA action *supplemental* to a *Bivens* action.

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[32] See the discussion below on recent unsuccessful attempts by the Department of Justice to lobby Congress to amend the FTCA to make it the exclusive remedy for "constitutional torts." S. 3314, 95th Cong. 2d Sess. (1978). *See also*, S. 695, 96th Cong. 1st sess. (1979); H.R. 2659, 96th Cong. 1st Sess. (1979).

> [A]fter the date of enactment of this measure, innocent individuals who are subjected to raids of the type conducted in Collinsville, Illinois, *will have a cause of action against the individual Federal agents and the Federal Government.* Furthermore, this provision should be viewed as a counterpart to the *Bivens* case and its progenty[sic], in that it waives the defense of sovereign immunity so as *to make the Government independently liable in damages for the same type of conduct* that is alleged to have occured in *Bivens* (and for which that cases imposes liability upon the individual Government officials involved).

S. Rep. No. 93-588, 93d Cong, 2d Sess., reprinted in (1974) U.S. Code Cong. & Admin. News, p. 2791 (emphasis supplied).[33]

The Senate Committee Report[34] clearly demonstrates a congressional intent to preserve the *Bivens* remedy, while creating an additional remedy, "coterminous with the liability of [Government] agents under *Bivens.*" *Norton v. United States,* 581 F.2d at 393, to be exercised at

[33] All courts which have had occasion to interpret the 1974 amendments are in full agreement with the position asserted by the Plaintiff. *Hernandez v. Lattimore, supra; Norton v. United States,* 581 F.2d 390, 395 (4th Cir. 1978). Additionally, in *Thornwell v. United States,* 471 F.Supp. 344 (D.D.C. 1979), the Court held that a discharged serviceman's complaint alleging the Army covered up LSD experiments performed upon him while on active duty and the consequent failure to provide follow-up examinations and treatment stated a claim against the United States and individual Army officials under the Fifth Amendment due process clause. The Court considered the impact of the 1974 amendments on the plaintiff's *Bivens*-type claim and concluded that they ". . . show that Congress plainly intended to permit Bivens and the Federal Tort Claims Act suits to exist side by side." *Id.* at 355.

[34] It is a well accepted principle of statutory interpretation that a court may resort to extrinsic sources to determine the objective of legislation. One of those extrinsic sources is the legislative history of the statute under consideration. Within the context of legislative history, it is a general principle that the reports of standing legislative committees represent "the most persuasive indicia of congressional intent", *United States v. Homestake Mining,* 595 F.2d 421, 428 (8th Cir. 1979); *Housing Authority of the City of Omaha v. United States Housing Authority,* 468 F.2d 1 (8th Cir. 1972), cert denied, 410 U.S. 927 (1973). *See also, Zuber v. Allen,* 396 U.S. 168, 186 (1969); *United States v. O'Brien,* 391 U.S. 367, 385 (1968); *Northern States Power Co. v. State of Minnesota,* 447 F.2d 1143, 1152 (8th Cir. 1971), *aff'd without opinion,* 405 U.S. 1035 (1972). The Supreme Court has stated that a committe report "represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen,* 396 U.S. at 186. Such a reort is therefore of great value in determining congressional intent.

[footnote continued]

the plaintiff's option. This legislative history of the 1974 amendments reflects Congress' basic understanding of the differences between a *Bivens* action and the FTCA, differences which the Defendants ignore.

The FTCA does not preempt *Bivens* because they address different kinds of wrongs. The FTCA provides a remedial scheme to redress common law torts, *United States v. Muniz,* 374 U.S. 150 (1963), while a *Bivens* remedy redresses violations of constitutionally protected interests which give rise to federal question jurisdiction under 28 U.S.C. §1331. In addition to the racial discrimination claim, which even the Defendant fails to argue is congizable under the FTCA, Plaintiff alleges a cruel and unusual punishment claim of intentional indifference to serious medical needs; both claims qualitatively different than a claim of negligent medical malpractice. *See, e.g., Estelle v. Gamble,* 429 U.S. 97 (1976).

This Court must also consider the acknowledgment by the Department of Justice that the FTCA is not an exclusive remedy in suits to vindicate transgressions of consti-

tutionally protected interests. This acknowledgement is evidenced by its sponsorship of legislation in several prior sessions of Congress to make the FTCA an exclusive remedy. Presently pending before Congress are proposed acts styled "A bill to amend Title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, to provide a remedy against the United States with respect to constitutional torts."[35] Senate Bill 695, 96th Cong., 1st Sess. (1979); H.R. 2659, 96th Cong., 1st Sess. (1979). The proposed amendment to 28 U.S.C. §2679 declares that

> [t]he remedy against the United States provided by sections 1346(b) and 2672 of this title for claims for injury or loss of property or personal injury or death resulting from the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment and for such claims arising under the Constitution . . . is exclusive of any other civil action or proceeding arising out of or relating to the same subject matter against the employee whose act or omission gave rise to the claim, or against the estate of such employee.

S. 695, 96th Cong., 1st Sess. Sec. 6 (1979).

Several unsuccessful attempts have been made to amend the FTCA to make it the exclusive remedy in

[35]The former Attorney General, Griffin B. Bell, in his testimony in support of S. 2117, which contained exclusivity provisions similar to that contained in S. 695, has conceded that the FTCA is not now an exclusive remedy for violations by federal employees of constitutionally protected interests.. *Amendments to the Federal Tort Claims Act': Joint Hearing on S. 2117 before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary*, United States Senate, 95th Cong., 2d Sess. (1978).

"constitutional tort" cases, the first coming as early as 1973, prior to the 1974 amendments to the Act. See, S. 3314, 95th Cong., 1st Sess. (1973); H.R. 10439, 93rd Cong., 1st Sess. (1973). Each of these proposed bills, sponsored by the Justice Department, would have provided for the exclusivity of remedy now sought by the government in the current session of Congress. Each time Congress has chosen not to extend "exclusivity" to constitutional violations. In fact, the one time it amended the FTCA it explicitly made it supplemental to a *Bivens* remedy.

This consistent rejection by Congress of attempts to amend the FTCA to make it the exclusive remedy for violations of constitutionally protected interests represents a recognition by Congress that the Act could not effectively provide as full and as adequate a remedy as is available under the Constitution.[36]

The *entire* legislative history, the prior decisional law, and an analysis of the act itself, clearly demonstrates that Congress did not intend to make the Act apply to Plaintiff's claims, let alone to make it the exclusive remedy, and thereby preclude relief directly under the Constitution.

[36]This Court has given consideration to the fact that a legislative body has considered and rejected an amendment to legislation. *See, Fox v. Standard Oil Co.*, 294 U.S. 87 (1934).

IV.

THE COURT OF APPEALS PROPERLY CREATED A FEDERAL COMMON LAW OF SURVIVAL IN THIS CASE BECAUSE DEATH WAS CAUSED BY THE UNCONSTITUTIONAL CONDUCT OF FEDERAL OFFICIALS AND THE RELEVANT STATE LAW WOULD ABATE THE ACTION.

The Defendants attack as an "unprecedented free-wheeling rule" (Pet. Br. at 41) the creation by the Court of Appeals of a federal common law of survival, when the Indiana survival statute would abate the Plaintiff's action against the Defendants. They incredulously assert that this statute, *Ind. Code Ann.* §34-1-1-1, under which no claim survives where death is caused by the conduct complained of, does "not frustrate the purposes of compensation and deterrence underlying the creation of constitutional damage actions." (Pet. Br. at 49)

The Defendants' assertion that "[u]nder Indiana law . . ., all causes of actions survive" (Pet. Br. at 14) is belied by an examination of the statute itself, as well as decisions interpreting the statute. As Plaintiff will demonstrate below, the Indiana survival statute is not only inconsistent, but totally repugnant to the policy underlying the *Bivens*-type action here which alleges serious violations of Fifth and Eighth Amendment rights. The Court of Appeals below gave the Indiana statute due consideration. The Court's decision to reject application of the statute and to create a federal common law of survival is consistent with well established policies which mandate full vindication for the deprivation of constitutional rights. The result reached below should be affirmed by this Court.

A. *Where federally protected rights have been invaded, the federal common law should govern the question of survival of the right of action.*

Even though the Court of Appeals rejected application of state law, it felt constrained to analyze the Indiana survival law for its possible application. To reach the Indiana statute, the Court utilized 42 U.S.C. §1988, as interpreted by this Court in *Robertson v. Wegmann*, because, in its view, "actions brought under the civil rights acts and those of the *Bivens*-type cases are conceptually identical and further the same policies, . . ." (Pet. App. 8a) Although Plaintiff agress with the result reached by the Court of Appeals, she submits that, by its own language, resort to §1988 is not statutorily required here. Plaintiff's decedent was a federal prisoner, incarcerated in a federal enclave and harmed by the unconstitutional conduct of federal officials. No state action or interest is even remotely involved, and no adverse effect on any state policy or interest can flow from the result in this case. It simply is not necessary for federal courts to engage in a piecemeal, case-by-case analysis of state law where a purely federal situation is involved.

This conclusion is fully supported by the Court's decision in *Bivens*, where great emphasis was placed on the need for an independent, uniform federal remedy where violations of constitutional rights occur. In *Bivens*, this Court unequivocably found that the Fourth Amendment "operates as a limitation upon the exercise of federal power regardless of whether the state in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." *Bivens*, 403 U.S. at 392. As Justice Harlan cogently summarized:

> . . . the limitations on state remedies for violation of common law rights by private citizens argue in

favor of a federal damages remedy. The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind. . . . *See Monroe v. Pape*, 365 U.S. 167, 195 (1961) (Harlan, J., concurring). It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability . . . [citations omitted]. Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers depencent on the state where the injury occurs. *Cf. United States v. Standard Oil Co.*, 332 U.S. 301, 305-311 (1947).

Bivens, 403 U.S. at 409 (Harlan, J., concurring).[37]

Plaintiff submits that where the relationship between the parties to the action is distinctively federal in character, no resort need be made to state law. Support for this approach is found in *United Stated v. Standard Oil Co.*, 332 U.S. 301 (1947), where this Court rejected the application of state law to determine whether the govern-

[37]More recently, this Court refused to be bound by state common law tort rules of damages in analogous §1983 cases. In *Carey v. Piphus*, 435 U.S. 247 (1978), the Court rejected the assertion that denials of procedural due process were not compensable and held that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Id.* at 266. After analyzing the federal interests involved, and without any specific discussion of the applicable state law, the Court said:

> The purpose of §1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.

Carey, 435 U.S. at 258.

ment had the right to indemnification for injuries suffered by a member of the armed forces. Where the ". . . scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority," 332 U.S. at 305-306, no purpose would be served by applying state law to matters which are essentially federal in nature. In *Standard Oil,* no reason existed why the government's right to indemnification "should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines." 332 U.S. at 310. This reasoning certainly applies with great force and effect to the facts of this case.

> The liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred. It should also be noted that because federal prison authorities decide the prison where a prisoner is incarcerated, those authorities in a sense choose the state in which the wrong occurs.

(Pet. App. 13a)[38]

Although there is no general federal statute governing the survivability of constitutional claims, there is a growing body of decisional law determining when claims survive. Much of the modern impetus for this development comes from *Moragne v. State Marine Lines, Inc.*,

[38]The three states which make up the Seventh Circuit, wherein this case arose, have four federal prisons within their boundaries, and all have different survival statutes. *See, Ind. Code Ann.* §34-1-1-1 (Burns); *Ill Rev. Stat.* Ch. 3 §339 (Smith-Hurd); and *Wisc. Stat. Ann.* §895.01 (West). Any rules this Court fashions on survival must take into account the thousands of federal prisoners who must pass through these four institutions yearly.

398 U.S. 375 (1970). There the plaintiff brought an action for wrongful death against the owner of a ship on which her deceased husband had been employed, based on unseaworthiness. Neither federal statute nor the law of Florida, the forum state, provided for such an action. Moreover, in *The Harrisburg*, 119 U.S. 119 (1886), the Court had specifically held that maritime law does not afford a cause of action for wrongful death.

In *Moragne*, the Court overruled *The Harrisburg*, and held that an action for wrongful death does lie under general maritime law. In so doing, the Court observed that since *The Harrisburg* there had been a proliferation of wrongful death statutes under federal and state law, and noted that,

> [t]hese numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a federal refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law . . . .

Moragne, 398 U.S. at 390-91.

While *Moragne* concerned actions for wrongful death (damages to the surviving dependents or next of kin of the decedent), and this action concerns survival of the claim the decedent could have brought had he lived, the case stands for the proposition that creation of remedies allowing for survival of claims is not limited to statute. Other federal courts have followed its lead in survival

actions. In *Spiller v. Thomas M. Lowe, Jr. and Associates, Inc.*, 466 F.2d 903 (8th Cir. 1972), an admiralty suit based on negligence and unseaworthiness, the defendant claimed that recovery should be denied because no survival provision is included in the Death of a High Seas Act, 46 U.S.C. §761-768. The Eighth Circuit rejected defendant's claim, holding that "*Moragne* provides the foundation for recognizing the federal right that an action for pain and suffering survives the death of the injured party." 466 F.2d at 911.

Similarly, in *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974), the Court, in affirming an award for the decedent's pain and suffering, found that:

> . . . the policy enunciated by the Supreme Court in *Moragne* provides ample support for us to hold that there is a federal maritime survival action, created by decisional law, for pain and suffering prior to death. This conclusion comports well with the philosophy of *Moragne*, in that it remedies the non-existence of a federal cause of action and thereby avoids the problem of making plaintiff's recovery turn on the existence of a state survival statute . . . .

Barbe v. Drummond, 407 F.2d at 799.

Likewise, the instant case provides this Court the opportunity to decide that in constitutional damage actions against federal officials, where no state interests are even remotely implicated, the claim will survive for the benefit of the decedent's estate, regardless what the law of the forum state may provide.

B. The Indiana survival statute is inconsistent and inhospitable with the policy underlying this *Bivens*-type action and was properly rejected by the Court of Appeals in favor of a federal common law of survival.

Should resort be made to state law in fashioning a federal rule on survival in this case, the ultimate result must still allow survival of Plaintiff's claims. The most analogous area applicable to this case is the decisional law that has evolved under 42 U.S.C. §1988. *Robertson v. Wegmann*, 436 U.S. 584 (1978). Although recognizing that "the instant action involves a *Bivens*-type claim" and that §1988 thus had "no statutory effect,"[39] (Pet. App. 8a), the Court of Appeals below nonetheless applied §1988 to this case. What law governs the survival of a constitutional damage action, as the Defendants concede (Pet. Br. at 42), is unequivocally a question of federal law which must serve federal interests. *Robertson*, 436 U.S. at 588; *Burks v. Lasker*, ___ U.S. ___, 99 S.Ct. 1831, 1836 (1979). Where a federal question is involved, resort to state law may be appropriate in rare

[39]The Court below applied *Robertson* to the case at bar because *Bivens*-type actions and actions pursuant to the Civil Rights Act are conceptually identical and further the same policies. The Court also noted that other courts have "looked to the Civil Rights Acts and their decisional gloss for guidance in filling the gaps left open in *Bivens*-type actions." (Pet. App. 9a). *See also, Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert denied*, 438 U.S. 907 (1978); *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975).

This Court applied the same reasoning in *Butz v. Economou*, 438 U.S. 478 (1978), wherein it stated: "[I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under §1983." *Id.* 435 U.S. at 500.

circumstances. *Burks v. Lasker; United States v. Kimbell Foods, Inc.*, ___ U.S. ___, 99 S.Ct. 1448 (1979); 42 U.S.C. §1988. However, whether pursuant to statute or decisional law, where importation of state law would be *inconsistent or inhospitable with the federal policy* underlying the right in question, it must be *rejected.*[40]

This is not the test the Defendants would have this Court apply. They seek a rule that the federal courts should slavishly follow the law of the forum state "unless

[40]The Defendants place great reliance on decisions involving statutes of limitation. This argument, however, misses its mark. Whether it be survival or limitation statutes, the critical inquiry remains whether the importation of state law would be consistent with the federal right at issue. Thus, in *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977), this Court, in ruling that a California statute of limitations did not apply to time-bar an action alleging a violation of Title VII, 42 U.S.C. §2000e, et seq., held that the borrowing of state rules was conditional on that rule being consistent with the federal right at stake. "(I)t is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." *Id.*, at 367. *See also, Beard v. Robinson*, 563 F.2d 331, 334 (7th Cir. 1977).

The Defendants argument also ignores a crucial difference between these statutes. Statutes of limitation provide some assurance that a defendant will not be held to answer a claim based on conduct long past. Survival statutes, however, serve no interest in repose; abatement arbitrarily cuts off all opportunity to redress injury rather than punishing one for sitting on his rights.

International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), on which Defendants place principal reliance, does not support application of the Indiana survival statute to this case. As *Hoosier* demonstrates, where application of the state law would frustrate, ". . . the achievement of any significant goal . . .", *id.*, 383 U.S. at 709, which underlies the federal rights at issue in the litigation, the federal courts may borrow that state law. However, where importation of the state law would, as here, totally frustrate the policies of deterrence, compensation, and uniformity which underlie constitutional damage actions, by abating the action, the state law must be rejected.

application of local law would *utterly* defeat the federal interests involved." (Pet. Br. at 42)[41] (emphasis supplied) This position should not be adopted by this Court, for it is not merely inconsistent with the federal policy underlying a *Bivens*-type action, but would, in the words of the Defendants, "utterly defeat" that policy. Such a result finds no support in decisions interpreting 42 U.S.C. §1988 or the Rules of Decision Act, 28 U.S.C. §1652.[42] The Defendants first assert that *Robertson*

[41] Put differently, the Defendants argue that "a court is justified in creating federal common law in this area only in the *extraordinary circumstance* that application of the state survival statute would *wholly frustrate* the institutional interests involved in a *Bivens*-type suit." (Pet. Br. at 41) (emphasis supplied)

[42] The Defendants argue that adoption of the Indiana survival statute as the law of this case "is strongly supported, if not compelled, by the Rules of Decision Act, 28 U.S.C. 1652." (Pet. Br. at 45) This conclusion misstates the effect that statute has on this case and is not supported by decisions of this Court. In *Sola Electric Company v. Jefferson Electric Company*, 317 U.S. 173 (1942), the Court stated:

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield.

317 U.S. at 176.

As demonstrated *infra*, the same factors are analyzed and the same result reached under the Rules of Decision Act and §1988. This Court must consider whether there is a need for a national uniform body of law to apply in like situations, whether the application of state law would frustrate any federal policy or interest underlying the federal rights in question, and whether any danger exists of interference with some state policy. *Burks v. Lasker; United States v. Kimbell Foods, Inc.; Wilson v. Omaha Indian Tribe*, ___ U.S. ___, 99 S.Ct. 914 (1979); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973); *Bivens; Textile*

[footnote continued]

"settles the proposition that state survival laws generally govern constitutional damages actions *against federal officials."* (Pet. Br. at 45). "[N]onetheless," they conclude, *Robertson* "is not dispositive of this case." (Pet. Br. at 47) In fact, *Robertson*[43] fully supports the Plaintiff's position.

In *Robertson*, the plaintiff, Clay Shaw, filed an action under 42 U.S.C. §1983 against several defendants claiming bad faith prosecution. After commencement of the litigation, but before trial, the plaintiff died. After the executor of Shaw's estate was substituted as plaintiff, the defendants moved for dismissal on the ground that the cause abated with Shaw's death. The District Court and the Court of Appeals found that federal common law

Workers v. Lincoln Mills, 353 U.S. 448 (1957); *United States v. Standard Oil Co.; Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). *See generally*, Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512 (1969).

Because Plaintiff considers these factors in conjunction with her argument concerning §1988, which clearly is the most closely analogous area, she will not separately argue under the Rules of Decision Act. Suffice it to say that given the federal policy underlying this *Bivens*-type action, applying a state survival statute that would abate all actions for personal injuries where death resulted from the conduct complained of would completely subvert that policy. Although a state statute cannot be considered inconsistent merely because the Plaintiff may lose the litigation, where a whole class of litigants would be thwarted, the state statute must be rejected as hostile to federal policy.

[43] In *Robertson*, this Court, recognizing that in certain areas federal law will be silent or insufficient to furnish suitable remedies, turned to 42 U.S.C. §1988 for guidance in fashioning the remedial rule. Section 1988 provides that when federal law is deficient as a suitable remedy, "the common law, as modified and changed by the constitution and statutes of the [forum] state" shall govern "so long as the same is not inconsistent with the Constitution and laws of the United States."

allowed for survival even though the Louisiana law of survival would have abated the action.

This Court reversed. It found that absent a claim that a state survival law is "generally inconsistent" with federal policy or interest by failing to provide for survival of a significant class of tort actions. and absent a situation where the "deprivation of federal rights caused death," *id.* at 594, "the mere fact of abatement of a particular lawsuit is not sufficient ground to declare state law 'inconsistent' with federal law." *Id.* at 594-95.

There are several crucial distinctions between *Robertson* and the case which support the result reached by the Court below that importation of state law would frustrate the policy embodied in the federal rights at issue here. The first is that the state law of survival in *Robertson* was more hospitable to and consistent with the nature of the federal right being protected. In that case, the Louisiana law generally permitted the type of action maintained by Shaw's executor to survive. It abated only because Shaw was not outlived by any of the statutorily designated kin.[44] This Court was careful to state, however, that "[a] different situation might well be presented . . . if state law did not provide for survival or any tort actions . . . or if it significantly restricted the types of action that survive." *Robertson*, 436 U.S. at 494. As an examination of the Indiana survival statute

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[44]Indeed, the claim of the Plaintiff in this case would have survived had it been brought in Louisiana. As this Court noted in *Robertson*, 436 U.S. at 591:

> In actions other than those for damage to property, however, Louisiana does not allow the deceased's personal representative to be substituted as a plaintiff; rather, the action survives only in favor of a spouse, children, *parents* or siblings. (emphasis supplied)

reveals, and as the Court of Appeals correctly concluded below, this proviso in *Robertson* applies here.

The proper reading of the Indiana survival statute, *Ind. Code Ann.* §34-1-1-1, is that causes of actions for personal injuries to the deceased survive, to the limited extent so provided, only when that person "thereafter dies from causes *other* than personal injuries so received." Here, the decedent is alleged to have died as a *direct* and *proximate* result of the acts of the Defendants. Therefore, the limited survival exception for personal injury actions under the Indiana statute does not apply to the facts of this case. If the statute were controlling, it would not merely limit the amount of recovery, as Defendants contend; rather, it would *abate* the action entirely.[45] Indiana decisional law is in accord with Plaintiff's interpretation of the Indiana statute. *See, Methodist Hospital v Town & Country Mut. Ins. Co.*, 136 Ind. App. 184, 197 N.E.2d 773, reh. denied, 198 N.E.2d 873 (1964).[46] Thus, contrary to the Defendants' incorrect assertion, not "all tort claims survive to some extent" in Indiana. (Pet. Br. at 47)[47]

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[45]This fact was recognized by the Court of Appeals below. As Judge Swygert indicated, "the only cause of action for personal injury permitted to survive under Indiana law encompasses a factual situation different from that alleged in this case." (Pet. App. 9a, n.8)

[46]Just as they do in arguing the applicability of the Federal Tort Claims Act to this *Bivens*-type action, the Defendants ignore the harsh reality which flows from application of the Indiana survival statute. Under both arguments put forward by the government, the Plaintiff will be without a remedy for the death of Joseph Jones, Jr.. Basic principles of justice and "evolving standards of decency" certainly would be offended by this result. More importantly, those responsible for Joseph Jones' death will never have to answer for their unconstitutional conduct in this case. *See*, Argument II, *supra.*

[47]See also, 1 Ind. L. Encyc. §21, Survival of Causes of Action, pp. 21-23; *Allen v. Whitehall Pharmacal. Co.*, 115 F.Supp. 7, 8 (S.D.N.Y. 1953).

To avoid the harsh result occasioned by application of the Indiana survival statute, the Defendants incorrectly assert the application of the Indiana Wrongful Death Statute, *Ind. Code Ann.* §34-1-1-2. *See, e.g.*, Pet. Br. at 9 n. 6, 48-49. Their claim is that both statutes, taken together, permit the survival of all actions. This argument is disingenuous and is thoroughly contradicted by Indiana decisional law.

As the Indiana Supreme Court has stated, §34-1-1-2 is designed "to create a cause of action to provide a means by which those who have sustained a loss by reason of the death may be compensated." *Pickens v. Pickens*, 225 Ind. 119, 126, 263 N.E.2d 151, 155 (1970). Section 34-1-1-2 has no effect on those actions the decedent's estate may bring for personal injuries to the decedent; it grants compensation to certain designated persons who were dependent and suffered a pecuniary loss from the decedent's death. The action is created in favor of the decedent's personal representative and is brought for the exclusive benefit of dependent widow, widower, children or next of kin. *Shipley v. Daly*, 196 Ind. 443, 20 N.E.2d 653 (1939); *Hilliker v. Citizens' Street Railroad Co.*, 152 Ind. 86, 62 N.E. 607 (1899). The statute is not a remedy for the victim. *Bocek v. Interr-Ins. Exch. of Chicago Motor Club*, 369 N.E.2d 1093, 1096 (Ind. App 1977).[48]

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[48]The present Wrongful Death Statute in the State of Indiana was originally contained in §784 of the Civil Code as adopted by the first Indiana legislature in 1852. (2 Rev. St. 1876, p. 309) Prior to the enactment of the Civil Code, a cause of action for an injury to a person died with that person. The passage of §784 was not an attempt to revive a person's cause of action for the injury suffered. The statute created a new cause of action against a tortfeasor for wrongfully causing the death of another. Any

[footnote continued]

The Defendants, however, misapply the wrongful death statute and then misconstrue Plaintiff's suit as an attempt to seek "windfall relief." (Pet. Br. at 49)[49] This, of course, runs afoul of the plain meaning of the Plaintiff's complaint. (App. 7-14) This is not a case of dependent survivor making a claim for pecuniary loss of support, but rather the estate of one who was deprived of fundamental human rights seeking redress for that death in the form of money damages.[50]

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action to recover damages for the injury to the decedent would be a distinct and separate action. This conclusion was reached by the Indiana Supreme Court in a case involving a wrongful death action against a railroad company. *Jeffersonville Railroad Co. v. Swayne's Administrator*, 26 INd. 477 (1866).

In another case involving a wrongful death action against a railroad, *Burns v. Grand Rapids and Indiana Railroad Co.*, 113 Ind. 169, 15 N.E. 230 (1888), the Indiana Supreme Court reiterated that §784 of the Civil Code did not revive the cause of action for personal injury to the decedent, but rather created a new cause of action in favor of the heirs or next of kin. "The recovery is not a penalty inflicted by way of punishment for the wrong, but is merely compensatory of the damages sustained by the heirs or next of kin, who had, or are supposed to have had, a pecuniary interest in the life of the intestate." 113 Ind. at 171. *See also, Louisville, N.A. & C. Ry. Co. v. Goodykoontz*, 119 Ind. 111, 21 N.E. 472 (1889).

[49]Defendants' arguments (Pet. Br. at 49) that some federal statutes, *e.g.*, 5 U.S.C. §8133(a), 33 U.S.C. §909, and 42 U.S.C. §1986, limit the amount of recovery as well as who may recover, are based on a wrongful death analysis and are, thus, inapplicable to this case.

[50]The Court of Appeals' rejection of application of the Indiana survival statute and the Court's fashioning of a federal common law of survival is bottomed on a correct understanding of both the nature of the Plaintiff's action and a proper interpretation of state law. As the Court below stated:

> It is important, however, to characterize plaintiff's complaint properly. The district court erred in its characterization. The

[footnote continued]

The Indiana statutory scheme for survival clearly offends the federal policy that underlies *Bivens* actions. As the Court stated in *Robertson*, "[t]he policies underlying §1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson*, 436 U.S. 590-91. These policies are equally applicable to a *Bivens* action, and it can hardly be denied that these policies are totally subverted by a statutory scheme which abates all claims where the unconstitutional conduct complained of is the *direct* and *proximate* cause of death. For this Court to hold that there can *never* be a civil rights or *Bivens* action brought in Indiana where death results from the official abuse or power would be to cheapen the very value of life itself. Allowing recovery for injury but denying relief for death would be a ghoulish mockery of the Bill of Rights and would place in the hands of prison officials the power to inflict punishment without fear of retribution. "Such a holding would not only fail to effectuate the policy of allowing complete vindication of constitutional rights; it would subvert that policy." (Pet. App. 12a)

The Court in *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961) was faced with an argument similar to Defendants' in an action brought by a surviving widow against various Georgia police officers for the illegal arrest and fatal beating of the decedent. Rejecting the defendant's contention that the civil rights statutes reflect a

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plaintiff is suing neither for deprivation of another's constitutional rights nor on an independent statutorily created cause of action for wrongful death. Rather, she is asserting her son's cause of action as the administrator of his estate.

Pet. App. 6a, n. 4.

purpose that actions under those statutes shall not survive, Judge Brown, for the Court, stated:

> [I]t defies history to conclude that Congress purposely meant to assure the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple.

293 F.2d at 404.

Even assuming the Indiana statute is generally hospitable, its application here, where the unconstitutional conduct caused death, would defeat the goal of preventing the abuse of power by officials which underlies *Bivens* actions.[51] As this Court noted in *Robertson*, although allowing the claim therein to abate, "the fact

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[51] The Defendants' assertion that "state laws of survivorship simply do not affect or regulate primary daily activity" (Pet. Br. at 44) misses its mark. While it may be true that federal prison officials are not versed in the intricacies of the Indiana statutes, they are congizant, Plaintiff assumes, of the proscriptions contained in the Constitution, and are aware that they can be held individually liable for violations thereof. Should this threat of individual liability for death be removed, the goal of deterrence will be weakened. The consequence will surely be greater violations in the future. Abatement of all actions resulting in death is hardly an encouragement to remedy the deplorable conditions which, as here, were allegedly responsible for four deaths at the USP, Terre Haute, in seven months' time.

Additionally, "[i]nsuring a specific deterrent under federal law gains importance from the very premise of the Civil Rights Act tht state tort policy often is inadequate to deter violations of the constitutional rights of disfavored groups." *Robertson*, 436 U.S. at 600 (Blackman, J., dissenting).

that a particular action might abate surely would not adversely affect §1983's role in preventing official illegality, *at least in situations in which there is no claim that the illegality caused the plaintiff's death."* 436 U.S. at 592 (emphasis supplied). Deterrence, as argued above on the applicability of the FTCA to this case, is bottomed on personal accountability. To arbitrarily release the malefactor who kills from liability when he who maims must answer in a court of law would defeat the goal of deterrence.

The Defendants seek to support this anomolous result by arguing that because the law of survival has no common law analogue, "the courts are less able to fashion such rules." (Pet. Br. at 45) This argument is further evidence that the Defendants seek a revival of the discarded common law principle that "no civil action lies for an injury which results in . . . death." *Insurance Co. v. Brame,* 95 U.S. 754, 756 (1878). In *Moragne,* this Court discussed the viability of this concept, stating:

> One would except, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized every since its inception, and described in such terms as "barbarous." *E.g., Osborn v. Gilliett,* L.R. 8 Ex. 88, 94 (1873) (Lord Bramwell dissenting); F. Pollock *Law of Torts* 55 (Landon ed. 1951); 3 W. Holdsworth, *History of English Law* 676-677 (3d ed. 1927).

> Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter.

398 U.S. at 381; *See also, Bell v. Hood,* 327 U.S. 678, 684 (1946).

There is no rational distinction to be made between the dead and the living in the area of constitutional claims. *Brazier v. Cherry,* 293 F.2d at 404. As Mr. Justice Harlan stated in another context:

> Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be non-auctionable simply because it was serious enough to cause death.

Moragne, 398 U.S. at 381.

The fact that Joseph Jones, Jr. was killed by the unconstitutional conduct of these Defendants requires this Court to hold that this cause of action survives. Any other holding would encourage federal officials not to stop once they had injured someone, but to be certain to kill. As Chief Justice Marshall stated in the landmark case of *Marbury v. Madison,* 5 U.S. (I Cranch) 137, 163 (1803):

> The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

CONCLUSION

The Defendants, accused here of serious unconstitutional acts causing death, urge upon this Court two related arguments which would totally eliminate Plaintiff's opportunity for any relief. Despite having never raised

it below, the Defendants create a broad anti-constitutional claim that the FTCA provides an "equally effective" remedy for Plaintiff and that this Court should preclude a remedy directly under the Constitution. Defendants make this contention in the face of the absolute abatement of the entire claim resulting from the Act's requirement that the Indiana survival statute be applied. Further, the Defendants, those who are charged with the wrongdoing here, have the audacity to tell the victim's administratrix that her right to a jury trial, punitive damages, and to enforce individual accountability against the wrongdoers, is not necessary to insure the full vindication of her constitutional claim. By the most disingenous and contorted reasoning, the Defendants would have Plaintiff's claims stripped of their constitutional power and reduced to mere negligent medical malpractice in order that they fit within the obvious limitations of the FTCA.

In its second argument, the Defendants pursue another theory devoid of merit which would again result in the total abatement of Plaintiff's claim. The Defendants argue that the Indiana wrongful death and survival statute be applied so that they may avoid liability for their wrongful acts.

If the fundamental protections contained in the Bill of Rights are to have any meaning, and if the goals of meaningful compensation and deterrence are to be achieved, Plaintiff must have the right to sue directly under the Constitution.

Failure to insure that a full and adequate remedy is available to Plaintiff and others who will follow will

only encourage further lawlessness and official misconduct, and denigrate the protections embodied in the Constitution. Wherefore, the Plaintiff urges this Court to affirm the judgment of the Court of Appeals in all respects.

Respectfully submitted,

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